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this Memorandum Decision shall not be
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**IN THE
COURT OF APPEALS OF INDIANA**

KENNETH J. FLOYD, II,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 20A03-0610-CR-471

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0212-FB-210
Cause No. 20D03-0610-FC-66

February 19, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following his guilty plea, Kenneth J. Floyd appeals his conviction and sentence for forgery, a Class C felony, and for being an habitual offender.¹ Floyd raises two issues, which we restate as whether the trial court abused its discretion in rejecting Floyd's motion to withdraw his guilty plea and whether his sentence is inappropriate. We affirm, concluding that the trial court acted within its discretion in rejecting Floyd's motion to withdraw his guilty plea and that his sentence is not inappropriate given the nature of the offense and Floyd's character.

Facts and Procedural History

On August 10, 2005, the State charged Floyd with one count of forgery, a Class C felony, receiving stolen property, a Class D felony, and with being an habitual offender. Floyd and the State also agreed to consolidate a pending probation violation with these charges. The matter was set for trial to be held on September 26, 2005. On that date, Floyd entered into a plea agreement. Under this agreement, Floyd pled guilty to forgery and admitted to being an habitual offender. Floyd also admitted to the probation violation. In exchange for this plea, the State dropped the charge of receiving stolen property. The trial court accepted the guilty plea and set a sentencing hearing and a disposition hearing for the probation violation for November 3, 2005. On October 28, 2005, the trial court received a

¹ In this appeal, Floyd has consolidated the cause number relating to the trial court's revocation of his probation. When Floyd entered his guilty plea, he also admitted that he violated probation based on the fact that he had committed the offense for which he pled guilty. Therefore, Floyd argues that if we reverse his conviction for forgery, we should also remand with instructions that the trial court reconsider its order

letter from Floyd in which he sought to withdraw his guilty plea. The trial court decided to treat this letter as a motion to withdraw Floyd's guilty plea,² and set a hearing for December 8, 2005; the hearing was later continued to December 15, 2005. At the hearing, Floyd testified: "I still felt before getting sentenced that [if] I wanted to withdraw my plea of guilty, that I could." Tr. at 52.³ He then proclaimed his innocence of the crime to which he pled guilty, and explained that he wanted to withdraw his plea because "I just believed my lawyer . . . was going to fight more for me, as he told me he would, than he did." *Id.* at 52-53. The trial court denied Floyd's motion and set sentencing for January 26, 2006. Following the sentencing hearing, the trial court sentenced Floyd to six years for forgery, and enhanced the sentence by eight years because of Floyd's status as an habitual offender.⁴ The trial court then revoked Floyd's probation, and ordered that Floyd execute the remainder of his sentence for the crime for which he was on probation. The trial court ordered that this sentence run consecutively to the forgery sentence.⁵ Floyd now appeals his conviction and sentence.

revoking Floyd's probation. Because we affirm Floyd's conviction, we need not consider this argument, and affirm Floyd's probation revocation.

² The trial court was not required to treat this letter as a motion to withdraw guilty plea, as it was not verified. *See Primmer v. State*, 857 N.E.2d 11, 15 (Ind. Ct. App. 2006), trans. denied. However, the trial court chose to overlook this "technical flaw." Transcript at 58.

³ This case involved twenty hearings under two different cause numbers, and the transcript is divided into two volumes; one for each cause number. In this opinion, we cite only to the volume containing hearings under cause # 20D03-0504-FC-00066.

⁴ In his brief, Floyd states that the court ordered the habitual offender enhancement be served "consecutively" with the forgery sentence. This is not entirely accurate, as an habitual offender enhancement is not a separate offense with a separate sentence, but is a status which results in an enhancement to the underlying felony sentence. *Greer v. State*, 680 N.E.2d 526, 527 (Ind. 1997).

Discussion and Decision

I. Guilty Plea

A. Standard of Review

“After entry of a plea of guilty . . . but before imposition of sentence, the court may allow the defendant by motion to withdraw his plea of guilty . . . for any fair and just reason unless the state has been substantially prejudiced by reliance upon the defendant's plea.” Ind. Code § 35-35-1-4(b). The party seeking to withdraw the guilty plea must establish the grounds for relief by a preponderance of the evidence. Ind. Code § 35-35-1-4(e). The trial court’s decision to deny a motion to withdraw a guilty plea “arrives in this Court with a presumption in favor of the ruling.” Coomer v. State, 652 N.E.2d 60, 62 (Ind. 1995). We will reverse the trial court’s ruling on such a motion only if we conclude the trial court abused its discretion. Ind. Code § 35-35-1-4(b); Bland v. State, 708 N.E.2d 880, 882 (Ind. Ct. App. 1999). We will conclude the trial court abused its discretion if the defendant shows that manifest injustice has occurred. See Ind. Code §35-35-1-4(b); Bland, 708 N.E.2d at 882.

On appeal, Floyd argues that he either misunderstood or was misinformed regarding his ability to withdraw his guilty plea. In moving to withdraw his guilty plea, Floyd also claimed that he was innocent of the crimes. He also argues that he has a defense because police officers violated his rights during interrogation. We will address each argument in

⁵ Although the trial court was not required to order that Floyd execute the remainder of his sentence, once it did so, the trial court was required to order that these sentences run consecutively. Ind. Code § 35-50-1-2(d)(1) (“If, after being arrested for one (1) crime, a person commits another crime . . . before the date the person is discharged from probation . . . the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences are imposed.”).

turn.

Floyd's argument that he misunderstood or was misinformed regarding his ability to withdraw his guilty plea boils down to an argument that the plea was not made knowingly and intelligently. When pleas are challenged on this ground, the defendant must show had he understood the consequences of pleading guilty, he would not have done so. Stewart v. State, 505 N.E.2d 61, 62 (Ind. 1987) (trial court was not required to allow defendant to withdraw guilty plea where defendant failed to demonstrate that trial court's omission of certain advisements had affected his decision to plead guilty); see Jackson v. State, 676 N.E.2d 745, 752 (Ind. Ct. App. 1997), trans. denied (in order to be entitled to withdraw guilty plea based on misinformation regarding sentencing, defendant must show that accurate information would have affected his decision to enter the plea). We first note that in his plea agreement, Floyd explicitly states that he is waiving his right to a trial, and that "should the Court not accept the plea agreement, the defendant will be given the opportunity to withdraw his/her plea of guilty." Appellant's Appendix at 153 (emphasis added). At his guilty plea hearing, Floyd testified that he had read and understood all statements in the agreement. Implicit in these statements to which Floyd agreed is that he does not have the right to freely withdraw his guilty plea. At his guilty plea hearing, the trial court instructed Floyd that "because you are entering this plea of guilty and this admission, [your] trials will not take place." Tr. at 20. We conclude that Floyd was informed that he did not have the right to freely withdraw his guilty plea. Most importantly, even if Floyd misunderstood or was subjectively unaware that he could not freely withdraw his plea, Floyd has wholly failed to

articulate how any failure to understand affected his decision to plead guilty. Therefore, Floyd has not met his burden, and we conclude the trial court acted within its discretion in denying Floyd's motion to withdraw his guilty plea.

Our supreme court has spoken to the situation in which defendants move to withdraw a guilty plea on the ground that they are actually innocent.

Admissions of guilt and assertions of innocence come in many shades of gray, and the trial judge is best situated to assess the reliability of each. A credible admission of guilt, contradicted at a later date by a general and unpersuasive assertion of innocence, may well be adequate for entering a conviction.

Carter v. State, 739 N.E.2d 126, 130 (Ind. 2000). In Carter, the court found no abuse of discretion where the defendant had provided a specific factual basis for his guilty plea and later proclaimed his innocence. Id. at 131; see also Owens v. State, 426 N.E.2d 372, 375 (Ind. 1981) (no abuse of discretion in denying motion to withdraw guilty plea where defendant gave general statement of innocence). Here, Floyd gave a fairly specific description of the commission of his crime when he entered his guilty plea. On the other hand, his assertions of innocence have been vague and unsupported by any factual explanations. The trial court did not abuse its discretion in denying Floyd's motion to withdraw his guilty plea.

At the hearing on Floyd's motion to withdraw his guilty plea, Floyd also argued that officers had violated his rights, and made no specific statements explaining his actual innocence. In his brief, Floyd states "Key to [his] contentions [that the trial court should have withdrawn his guilty plea] were that his rights were violated by police officers." Appellant's Brief at 11. If Floyd is arguing not that he is actually innocent of the crimes, but

merely that he has an applicable defense, he has also failed to meet his burden. “[I]t is not enough merely to assert that . . . possible defenses exist to show that the trial court abused its discretion in denying a motion to withdraw a guilty plea.” Hunter v. State, 676 N.E.2d 14, 18 (Ind. 1996). When Floyd pled guilty and originally moved to set aside his guilty plea, he made no mention of this defense.⁶ He first mentioned this defense at his hearing to withdraw his guilty plea, almost three months after he entered his guilty plea. See id. (no abuse of discretion in denying motion to withdraw guilty plea where defendant did not mention possible defense until almost three months after pleading guilty); Flowers v. State, 528 N.E.2d 57, 59 (Ind. 1988) (no abuse of discretion where defendant made no mention of possible alibi defense until five months after testifying that he committed the crime). We conclude that the trial court did not abuse its discretion in denying Floyd’s motion to withdraw his guilty plea.

II. Sentencing

A. Standard of Review

When reviewing a sentence imposed by the trial court, we “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Ind. Appellate Rule 7(B). We have authority to “revise sentences when certain broad conditions are satisfied.” Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005).

⁶ We note that this is not a situation where new law has provided Floyd with a defense that did not exist when he entered his guilty plea, or one in which the defense plainly appears in the record. See Turner v.

B. Appropriateness of Lloyd's Sentence

The trial court sentenced Floyd to six years for forgery and enhanced the sentence by eight years for his status as an habitual offender, for a total sentence of fourteen years. As Floyd committed the forgery while on probation for a previous conviction, the trial court also ordered that Floyd execute the remainder of his sentence for the previous conviction.

When reviewing a sentence under Rule 7(B), we recognize that the advisory⁷ sentence is that which the legislature has deemed an appropriate sentence for the crime committed. Childress v. State, 848 N.E.2d 1073, 1081 (Ind. 2006). The advisory sentence for a Class C felony is four years, with a minimum of two years and a maximum of eight years. Ind. Code § 35-50-2-6. Therefore, the trial court ordered that Floyd serve a sentence halfway between the advisory and the maximum sentence for the forgery charge. Under the habitual offender statute, a trial court may enhance a sentence by “an additional fixed term that is not less than the advisory sentence for the underlying offense nor more than three (3) times the advisory sentence for the underlying offense.” Ind. Code § 35-50-2-8(h). Therefore, the trial court enhanced Floyd's sentence by an amount halfway between the minimum and maximum amount by which his forgery sentence could have been enhanced based on his status as an habitual offender.

The nature of Floyd's offense certainly does not warrant a sentence above the

State, 843 N.E.2d 937, 944 (Ind. Ct. App. 2006) (reversal required where defendant made “convincing showing that he has a credible defense” that did not exist when he entered his guilty plea).

⁷ After Floyd committed the offense, but before he was sentenced, our legislature amended our sentencing statutes to replace “presumptive” sentences with “advisory” sentences, effective April 25, 2005. Weaver v. State, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), trans. denied. Because Floyd challenges his

advisory. Floyd exerted unauthorized control of a check for sixty-five dollars. Based on the record, Floyd put no person in danger in the commission of his crime. Although we do not trivialize Floyd's actions, we find nothing in the record that distinguishes Floyd's crime from the garden-variety forgery.

However, based on Floyd's character, we conclude that the trial court's sentence is not inappropriate. We recognize that a defendant's plea of guilty in some instances demonstrates remorse and indicates that the defendant is taking responsibility for his actions. Francis v. State, 817 N.E.2d 235, 237-38 (Ind. 2004). However, the circumstances surrounding Floyd's guilty plea reduce its significance. First, Floyd pled guilty on the day of his trial, thereby reducing the benefit he extended to the State. See Gillem v. State, 829 N.E.2d 598, 605 (Ind. Ct. App. 2005), trans. denied. Second, Floyd received a significant benefit for his plea when the State dropped a felony charge. See Patterson v. State, 846 N.E.2d 723, 729 (Ind. Ct. App. 2006). Further, Floyd has subsequently attempted to withdraw his guilty plea and denied responsibility for the crime. See Payne v. State, 838 N.E.2d 503, 509 (Ind. Ct. App. 2005), trans. denied (significance of plea reduced where circumstances showed that defendant was not taking full responsibility for his actions).

We also recognize that Floyd is twenty-two years old, and youth may be worthy of significant mitigating weight in some circumstances. Brown v. State, 720 N.E.2d 1157, 1159 (Ind. 1999), habeas corpus denied, 2006 WL 1547081 (S.D. Ind. 2006). However, the significance of Floyd's youth is tempered by the fact that by this age, he has already

sentence only under Rule 7(B), we need not decide whether the old or new sentencing scheme applies. For

accumulated four juvenile adjudications for child molestation, one adjudication for auto theft, two felony convictions for theft and one felony conviction for child molestation. See Monegan v. State, 756 N.E.2d 499, 504-05 (Ind. 2001) (recognizing that although defendant was young, he had also accumulated a significant criminal history). Also, Floyd has previously had his probation revoked, and committed the current offense while he was on probation, thus indicating that forms of punishment alternative to imprisonment have not worked.

We conclude that based on Floyd's character, the sentence imposed by the trial court is not inappropriate.

Conclusion

We conclude that the trial court did not abuse its discretion in denying Floyd's motion to withdraw his guilty plea. We further conclude that his sentence is not inappropriate based on the nature of the offense and his character.

Affirmed.

BAKER, J., and DARDEN, J., concur.